Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–01–87 OF 1999
JAMES FOONG, ZALEHA ZAHARI, AND ABDULL HAMID EMBONG JJCA
26 JUNE 2007

B

Labour Law — Trade union — Recognition — Claim for — Failure to appeal to Minister against DGTU's findings on issue of 'competency' pursuant to s 71A(1)(a) of Trade Unions Act 1959 — Whether DGTU's decision that second respondent was competent union to represent appellants' employees would be binding upon appellants — Whether court in judicial review proceedings should reverse findings of fact of DGTU

C

D

Labour Law — Industrial dispute — Recognition of trade union — Decision of Minister — Whether Minister entitled to rely on reports submitted by DGIR containing the opinion/findings of DGIR/DGTU — Whether Minister must conduct further enquiry

E

On 19 October 1996 the second respondent, a trade union for non-metallic workers, issued a notice of claim for recognition in Form A of the Industrial Relations Regulations 1980 ('the regulations') from the appellants. Upon receipt of the second respondent's claim for recognition the appellants did nothing. The appellants did not accord recognition, neither did they notify the second respondent in writing of the grounds for not according recognition within the 21 days period provided in the law. The appellants did not, at that stage, deem it fit to state that the reason they were not according recognition to the second respondent was because their manufacturing activities involved 'handicraft' work, or because of the usage of metals in their products, a 'non-metallic union' was not the right union to represent their workers. A month lapsed before the appellants acted on the claim for recognition. The appellants issued a letter dated 18 November 1996 to the DGIR requesting the DGIR to carry out an examination to ascertain whether the second respondent was competent to represent their employees. On the part of the second respondent, when the appellants did not respond to their claim for recognition within the 21 days period provided by s 9(3), the second respondent lodged a report in writing vide letter dated 20 December 1996 to the DGIR requesting him to intervene to the claim for recognition pursuant to s 9(4) of Industrial Relations Act 1967 ('the Act'). The DGIR then exercised the power conferred upon him by s 4B(b) of the Act. As the issue of competency of the second respondent to represent the appellants' employees had been raised, the DGIR requested the DGTU to carry out an investigation and submit a report to him, which letter was also extended to the appellants and the second respondent.

F

G

H

I

The DGTU then submitted a report of the result of his investigations and findings on the issue of the second respondent's competency to represent the appellants' employees to the DGIR. According to the DGTU's report dated 24 May 1997, after

carrying out the investigations which he did, the DGTU was of the opinion that the second respondent was competent to represent the appellants' employees. Upon receipt of the DGTU's report, the DGIR issued letter dated 11 June 1997 informing the appellants (as well as the second respondent) of the DGTU's findings. In the same letter the DGIR informed both the appellants and the second respondent that a membership check would be carried out to ascertain whether the majority of the appellants' employees were members of the second respondent upon receipt of Forms B and C of the regulations, and that they would both be duly notified of the result of the membership check. Another letter was issued by the DGIR on the same date to the appellants by which letter the appellants were informed that a membership check pursuant to regulation 4(1)(a) of the regulations would be conducted. For this purpose the appellants were required to furnish to the DGIR a list of their employees as at 19 October 1996 in Form B of the regulations not later than 25 June 1997. The appellants responded to the DGIR's letter dated 11 June 1997 in terms of letter dated 1 July 1997. They disputed the findings of the DGTU and the DGIR that the second respondent was competent to represent their employees.

The DGIR issued another letter on 9 July 1997 to the appellants, which letter was sent by registered post. By reason of the issue of 'competency' having been determined in the second respondent's favour, the appellants were advised to make a decision on the claim of recognition. In para 3 of this letter the DGIR expressly stated that should the appellants fail to make a decision, the appellants were required to furnish, in triplicate, a list of the names of appellants' employees eligible to be represented by the second respondent on the date recognition was sought (19 October 1996), which information had earlier been requested by letter dated 11 June 1997.

The appellants furnished three copies of Form B to the DGIR as requested. In the second paragraph of this letter the appellants raised for the first time the issue of their involvement in 'handicraft business', and they again disputed the DGIR's findings of competency of the second respondent to represent their employees. The DGTU informed the DGIR of the result of the membership check carried out by letter dated 13 January 1998. According to this letter the membership check carried out by the DGTU showed, as at the date recognition was sought (19 October 1996), 73.52% of the appellants' employees were members of the second respondent.

The DGIR duly notified the appellants of the result of the membership check carried out by the DGTU and advised the appellants to accord recognition to the second respondent. Paragraph 5 of this letter required the appellants to communicate their decision direct to the second respondent within 14 days of the date of that letter, and to extend a copy thereof to the DGIR. The appellants were also informed that, should the matter not be resolved within the specified period given, s 9(4C) of the Act would be invoked. The appellants did not abide by the DGIR's advice. The time frame given for the appellants to make a decision lapsed. This continued failure on the part of the appellants to make a decision on the claim for recognition caused the DGIR to issue yet another letter on 18 February 1998 to them. By this letter a final opportunity of another period 14 days was given to the appellants to make a decision on the claim for recognition. The appellants were again notified that should they fail to make a decision within the extended period given, the matter would be referred to the first respondent ('the Minister') pursuant to s 9(4C) of the Act. This extended period of 14 days again passed by without the appellants making any decision on the

claim for recognition. As the DGIR was unable to resolve the dispute, the DGIR submitted a report on the matter to the Minister together with the reports and findings of the DGTU. Based on the material provided to him, the Minister's decision dated 21 March 1998 was that the appellants was to accord recognition to the second respondent with effect from 19 October 1996. The appellants obtained leave to apply for an order of certiorari to quash the decision of the Minister. The substantive motion for certiorari was dismissed by the High Court, thus the appellants appealed. The appellants' case essentially rested on whether in arriving at the findings which the respective authorities did, and the Minister's reliance on the reports submitted by the relevant authorities after carrying the investigations which they did, had complied with the rules of natural justice.

Held, dismissing the appeal with costs:

(1) The DGTU clearly had a statutory duty under s 9(4A) of the Act to attempt to resolve a claim for recognition. Notwithstanding the fact that appellants' request to the DGIR to conduct an examination on the competency of the second respondent was lodged out of time frame provided by the law, the DGIR was nevertheless under a statutory duty to act upon the report in writing lodged by the second respondent under s 9(4) consequent upon the appellants' failure to respond to the claim for recognition within the prescribed time frame. As the DGIR was under a statutory duty to resolve the claim of recognition upon receipt of the second respondent's report in writing under s 9(4), nothing turned on the appellants' request to the DGIR to investigate on the competency of the second respondent to represent the appellants' employees out of the time frame prescribed by s 9(3) (see para 17).

(2) Although the appellants had the right to appeal to the Minister against the DGTU's findings on the issue of 'competency' pursuant to s 71A(1)(a) of the Trade Unions Act 1959 ('the Trade Unions Act'), whether deliberately or otherwise, this right was not exercised. The effect of the appellants' failure to exercise this right of appeal against the findings of the DGTU on the issue of competency within the time frame given in s 74(1)(c) of the Trade Unions Act was that the DGTU's decision that the second respondent was a competent union to represent the appellants' employees was binding upon the appellants. In this situation the learned High Court judge had not erred when he took note of the appellants' failure to challenge the findings of the DGTU. Therefore, by reason of the appellants' failure to exercise their right of appeal to the Minister on this issue, it was no longer open for the appellants to subsequently question the competency of the second respondent to represent the appellants' employees. In any event, even if an appeal had been lodged, the appellants was not entitled to call on the DGTU to justify his findings of fact on the issue of competency, nor to expect a court in judicial review proceedings to reverse the findings of fact of the DGTU (see paras 24–25).

(3) In the light of the court's earlier ruling on the failure to exercise the right of appeal to the Minister on the issue of competency, it was too late for the appellants at this stage to advance further grounds at the DGIR and DGTU

level, to review their earlier findings. The DGIR and DGTU was 'functus officio' as far as the issue of competency was concerned (see para 27).

(4) The procedure prescribed by the law had clearly been observed by all of the relevant authorities at the different stages of the decision making process. On the part of the DGTU, in making the enquiries at the two-staged process, prior to giving his expert opinion for the consideration of the DGIR in attempting to resolve the claim for recognition, it was abundantly clear that the appellants had been given the fullest opportunity to participate and state their case on the respective issue then in question. The record showed of repeated requests and opportunities given to the appellants to furnish all relevant documents and information for the consideration of the relevant authorities (see para 34).

(5) The results of investigations carried out by the DGIR and the DGTU's Department were important material to enable the DGIR in the first instance to resolve a dispute. These reports were relevant and important material in the making of a considered decision by the Minister under s 9(5) of the Act. The submission of these reports to the Minister established that the Minister had been adequately informed and been appraised of all relevant facts to enable him to make a considered decision on the claim for recognition in issue which could not be resolved by the DGIR. The Minister was clearly entitled to rely on the reports submitted. There was no necessity for the Minister himself to conduct a further enquiry as contended by the appellants (see para 36).

(6) On the allegation that the Minister's decision was liable to be set aside by reason of a failure to give detailed reasons in arriving at the decision which he did, the record showed that the appellants were well aware that the Minister's decision was grounded on the reports submitted by the DGIR containing the opinion/findings of the DGIR/DGTU, that the appellants' employees came within the membership scope of the second respondent and the result of the membership check carried out showing that 73.52% of the appellants' employees were members of the second respondent on the date recognition was sought (see para 37).

[Bahasa Malaysia summary

Pada 19 Oktober 1996 responden kedua, kesatuan sekerja untuk pekerja-pekerja bukan logam, mengeluarkan notis tuntutan untuk pengiktirafan dalam Borang A Peraturan Perhubungan Perusahaan 1980 ('Peraturan') daripada perayu-perayu. Apabila menerima tuntutan responden kedua untuk pengiktirafan, perayu-perayu tidak berbuat apa-apa. Perayu-perayu tidak menerima pengiktirafan, mahu pun memaklumkan responden kedua secara bertulis alasan-alasan kerana tidak bersetuju pengktirafan dalam tempoh 21 hari sebagaimana diperuntukkan oleh undang-undang. Perayu-perayu tidak, pada peringkat ini, menganggap ia sesuai untuk menyatakan sebarang sebab mereka tidak bersetuju kepada pengiktirafan kepada responden kedua kerana aktiviti-aktiviti perkilangan melibatkan kerja 'kraftangan'. Atau kerana penggunaan logam dalam produk mereka, kesatuan sekerja 'bukan logam' adalah bukan kesatuan yang betul untuk mewakili perekerja-perkerja ini. Sebulan telah berlalu sebelum perayu-perayu bertindak ke atas tuntutan untuk pengiktirafan. Perayu-perayu mengeluarkan sepucuk surat bertarikh 18 November

1996 kepada DGIR meminta DGIR menjalankan pemeriksaan untuk memastikan sama ada responden kedua adalah layak untuk mewakili pekerja-pekerjanya. Di pihak responden kedua, apabila perayu-perayu tidak menjawab kepada tuntutan mereka untuk pengiktirafan dalam tempoh 21 hari sebagaimana yang disediakan oleh s 9(3), responden kedua membuat aduan secara bertulis melalui surat bertarikh 20 Disember 1996 kepada DGIR meminta mereka supaya mencelah kepada tuntutan untuk pengiktirafan mengikut peruntukkan s 9(4) Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). DGIR kemudiannya menggunakan kuasa yang diberikan kepadanya melalui s 43(b) Akta tersebut. Memandangkan isu kelayakkan responden kedua untuk mewakili pekerja-pekerja perayu telah dibangkitkan, DGIR meminta DGTU untuk menjalan penyiasatan dan menghantar laporan kepadanya, surat tersebut juga dihantar kepada perayu-perayu dan responden kedua.

DGTU kemudiannya menghantar laporan berkenaan keputusan penyiasatannya dan pendapatnya berkenaan dengan isu kelayakan responden kedua untuk mewakili pekerja-pekerja perayu kepada DGIR. Menurut laporan DGTU bertarikh 24 Mei 1997, selepas menjalankan penyiasatan yang telah pun dilakukannya, DGTU berpendapat bahawa responden kedua adalah layak untuk mewakili pekerja-pekerja perayu. Apabila menerima laporan DGTU, DGIR menghantar sepucuk surat bertarikh 11 Jun 1997 memaklumkan perayu-perayu (dan juga responden kedua) berkenaan penemuan DGTU. Dalam surat yang sama DGIR memaklumkan kedua-dua perayu-peryu dan responden kedua bahawa pemeriksaan keahlian akan dibuat untuk memastikan sama ada majoriti pekerja-pekerja perayu adalah ahli kepada responden kedua apabila menerima Borang-borang B dan C peraturan-peraturan, dan mereka akan dimaklumkan keputusan berkenaan pemeriksaan keahlian. Sepucuk surat lagi dikeluarkan oleh DGIR pada tarikh sama kepada perayu-perayu yang mana surat kepada perayu-perayu memaklumkan bahawa pemeriksaan keahlian adalah menurut peraturan 4(1)(a) Peraturan akan dijalankan. Bagi tujuan ini, perayu-perayu dikehendaki menyediakan kepada DGIR satu senarai pekerja-pekerjanya setakat 19 Oktober 1996 dalam Borang B peraturan tersebut tidak lewat daripada 25 Jun 1997. Perayu-perayu membalas surat DGIR bertarikh 11 Jun 1997 dan ia disebut dalam surat bertarikh 1 Julai 1997. Mereka mempertikaikan penemuan-penemuan DGTU dan DGIR bahawa responden kedua adalah layak untuk mewakili pekerja-pekerjanya.

DGIR mengeluarkan sepucuk surat lagi pada 9 Julai 1997 kepada perayu-perayu yang mana surat tersebut telah dihantar melalui pos berdaftar. Bersandarkan kepada isu 'kelayakan' yang telah ditentukan dipihak responden kedua, perayu-perayu dinasihatkan untuk membuat keputusan berkenaan tuntutan untuk pengiktirafan. Diperenggan tiga surat ini DGIR secara jelasnya menyatakan jika perayu-perayu gagal membuat keputusan, perayu-perayu dikehendaki untuk menyediakan, dalam tiga salinan, senarai nama-nama pekerja-pekerja perayu yang layak untuk diwakili oleh responden kedua pada tarikh pengiktirafan dipohon (19 Oktober 1996), yang mana maklumat ini telah diminta melalui surat bertarikh 11 Jun 1997.

Perayu-perayu menyediakan tiga salinan Borang B sebagaimana permintaan DGIR. Dalan perenggan kedua surat ini perayu membangkitkan untuk pertama kali isu penglibatan mereka dalam 'perniagaan kraftangan', dan mereka sekali lagi mempertikaikan penemuan DGIR mengenai kelayakkan responden kedua untuk mewakili pekerja-pekerjanya. DGTU memaklumkan DGIR berkenaan dengan keputusan pemeriksaan keahlian yang telah dijalankan melalui surat bertarikh

13 Januari 1998. Menurut surat ini lagi pemeriksaan keahlian yang dijalankan oleh DGTU menunjukkan, setakat tarikh permohonan pengiktirafan (19 Oktober 1996), 73.52% pekerja-pekerja perayu adalah ahli kepada responden kedua.

DGIR juga memaklumkan perayu-perayu berkenaan dengan keputusan pemeriksaan keahlian yang dijalankan oleh DGTU dan menasihatkan perayu-perayu supaya bersetuju dengan pengiktirafan kepada responden kedua. Perenggan lima surat ini memerlukan perayu-perayu untuk menyampaikan keputusan mereka secara terus kepada responden kedua dalam masa 14 hari dari tarikh surat tersebut, dan memajukan salinannya kepada DGIR. Perayu-perayu juga dimaklumkan bahawa, jika perkara ini tidak dapat diselesaikan dalam jangkamasa yang diberikan, s 9(4C) Akta tersebut akan digunapakai. Perayu-perayu tidak mematuhi nasihat DGIR. Tempoh masa yang diberikan kepada perayu-perayu untuk membuat keputusan telah berlalu. Kegagalan berterusan dipihak perayu-perayu untuk membuat keputusan ke atas tuntutan untuk pengiktirafan menyebabkan DGIR mengeluarkan sepucuk surat lagi kepada meraka pada 18 Februari 1998. Surat ini merupakan peluang terakhir untuk tempoh 14 hari yang telah diberikan kepada perayu-perayu untuk membuat keputusan terhadap tuntutan untuk pengiktirafan Perayu-perayu sekali lagi dimaklumkan bahawa jika mereka gagal untuk membuat keputusan dalam masa tambahan yang telah diberikan, perkara ini akan dirujuk kepada responden pertama ('Menteri') sebagaimana peruntukkan s 9(4C) Akta tersebut. Tempoh tambahan selama 14 hari sekali lagi berlalu tanpa perayu-perayu membuat sebarang keputusan berkenaan tuntutan untuk pengiktirafan. Memandangkan DGIR tidak dapat menyelesaikan pertikaian, DGIR menghantar satu salinan mengenai perkara ini kepada Menteri bersama-sama dengan laporan-laporan dan penemuan-penemuan DGTU. Berdasarkan kepada bahan-bahan yang telah disediakan kepadanya, keputusan Menteri bertarikh 21 Mac 1998 adalah perayu-perayu hendaklah bersetuju ketas pengiktirafan kepada responden kedua bermula 19 Oktober 1996. Perayu-perayu mendapat kebenaran memohon perintah certiorari untuk membatalkan keputusan menteri. Usul substantif untuk certiorari telah ditolak oleh Mahkamah Tinggi, dengan itu perayu-perayu merayu. Kes perayu-perayu pada asasnya adalah sama ada semasa mencapai keputusan yang masing-masing telah dibuat oleh pihak-pihak berkuasa, dan pergantungan Menteri kepada laporan-laporan yang dihantar oleh pihak-pihak berkuasa yang relevan selepas menjalankan penyisatan-penyiasatan yang mana telah dilakukannya, mematuhi aturan-aturan keadilan asasi.

Diputuskan, menolak rayuan dengan kos:

(1) DGTU jelasnya mempunyai kewajipan statutori kepada Akta untuk cuba menyelesaikan tuntutan pengiktirafan. Meskipun fakta bahawa permintaan perayu-perayu kepada DGIR untuk menjalankan pemeriksaan ke atas kelayakkan responden kedua telah dibuat diluar aturan masa yang disediakan oleh undang-undang, namun DGIR di bawah kewajipan statutori bertindak apabila laporan bertulis dibuat oleh responden kedua di bawah s 9(4) akibat daripada kegagalan perayu-perayu untuk membalas tuntutan pengiktirafan dalam masa yang telah ditetapkan. Memandangkan DGIR adalah di bawah kewajipan statutori untuk menyelesaikan tuntutan pengiktirafan apabila menerima laporan bertulis responden kedua, tiada apa-apa yang berlaku

kepada permintaan responden kedua kepada DGIR untuk menyiasat kelayakkan responden kedua untuk mewakili pekerja-pekerja perayu diluar tempoh masa sebagaimana ditentukan oleh s 9(3) (lihat perenggan 17).

(2) Walaupun perayu-perayu mempunyai hak untuk merayu kepada Menteri terhadap keputusan DGTU ke atas isu 'kelayakkan' menurut s 71A(1)(a) Akta Kesatuan-Kesatuan Sekerja 1959 ('Akta Kesatuan-Kesatuan Sekerja') sama ada secara sengaja atau sebaliknya, hak ini tidak digunakan. Kesan kegagalan perayu-perayu untuk menggunakan hak rayuan ini terhadap penemuan-penemuan DGTU ke atas isu kelayakkan dalam tempoh masa diberikan dalam s 74(1)(c) Akta Kesatuan-kesatuan Sekerja adalah keputusan DGTU bahawa responden kedua adalah kesatuan yang layak untuk mewakili pekerja-pekerja perayu adalah terikat kepada perayu-perayu. Dalam situasi ini hakim Mahkamah Tinggi yang bijaksanan tidak khilaf bila beliau memberikan perhatian ke atas kegagalan perayu-perayu untuk mencabar keputusan-keputusan DGTU. Oleh itu, dengan sebab kegagalan perayu-perayu untuk menggunakan hak mereka untuk merayu kepada Menteri ke atas isu ini, ia tidak lagi terbuka kepada perayu-perayu untuk kemudiannya menyoal kelayakkan responden kedua untuk mewakili pekerja-pekerja perayu. Pada setiap keadaan, jika rayuan telah dibuat, perayu-perayu tidak berhak untuk memanggil DGTU untuk memberikan justifikasi fakta kepada penemuannya berkenaan isu kelayakkan, atau berharap mahkamah dalam prosiding semakan kehakiman akan mengakaskan penemuan fakta oleh DGTU (lihat perenggan 24-25).

(3) Berkenaan keputusan terdahulu mahkamah ke atas kegagalan menggunakan hak untuk merayu kepada Menteri atas isu kelayakkan, ia sudah terlambat untuk perayu pada peringkat ini untuk membawa alasan-alasan selanjutnya pada peringkat DGIR dan DGTU, untuk menyemak semula keputusan-keputusan terdahulu. DGIR dan DGTU telah *functus officio* terhadap isu kelayakkan (lihat perenggan 27).

(4) Kaedah yang ditentukan oleh perundangan telah secara jelasnya dipertimbangkan oleh kesemua pihak-pihak berkuasa yang relevan pada peringkat yang berbeza semasa proses membuat keputusan Pada bahagian DGTU, dalam membuat pertanyaan pada proses dua-peringkat, sebelum memberikan pendapat pakar untuk pertimbangan DGIR dalam percubaan menyelesaikan tuntutan pengiktirafan, ia adalah amat jelas sekali bahawa perayu-perayu telah memberikan kesempatan yang sebaiknya untuk turut serta dan menyatakan kes mereka pada isu-isu yang menjadi persoalan. Laporan menunjukkan permintaan berulang kali dan peluang-peluang yang telah diberikan kepada perayu-perayu unutk memberikan segala dokumen yag relevan dan maklumat untuk pertimbangan pihak-pihak berkuasa relevan (lihat perenggan 34).

(5) Keputusan-keputusan penyiasatan-penyiasatan yang telah dijalankan oleh DGIR dan jabatan DGTU adalah bahan yang penting untuk membolehkan DGIR pada peringkat pertama menyelesaikan pertikaian ini. Laporan-laporan ini adalah relevan dan bahan yang penting dalam membuat pertimbangan keputusan oleh Menteri di bawah s 9(5) Akta tersebut. Penyerahan laporan-laporan ini kepada menteri membuktikan bahawa Menteri telah

dimaklumkan secukupnya dan menilai fakta-fakta relevan bagi membolehkannya untuk membuat pertimbangan keputusan atas isu tuntutan pengiktirafan yang tidak dapat diselesaikan oleh DGIR. Menteri jelasnya berhak untuk berpegang kepada laporan yang telah diserahkan. Tiada keperluan untuk Menteri sendiri menjalankan penyiasatan sebagaimana yang ditegaskan oleh perayu-perayu (lihat perenggan 36).

(6) Berkenaan dakwaan bahawa keputusan Menteri adalah boleh diketepikan atas alasan kegagalan untuk memberikan sebab-sebab terperinci dalam mencapai keputusan yang telah dibuat, rekod menunjukkan bahawa perayu-perayu menyedari bahawa keputusan menteri berdasarkan kepada laporan-laporan yang dihantar oleh DGIR yang mengandungi pendapat/keputusan DGIR/DGTU, bahawa pekerja-pekerja perayu adalah dalam skop keahlian responden kedua dan keputusan pemeriksaan keahlian yang dijalankan menunjukkan bahawa 73.52% pekerja-pekerja perayu adalah ahli kepada responden kedua apada tarikh pengiktirafan dipohon (lihat perenggan 37).]

Notes

For cases on recognition, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1659–1682.

For cases on recognition of trade union, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1568.

Cases referred to

Euromedical Industries Sdn Bhd v Menteri Sumber Manusia & Yang Lain [1999] 5 CLJ 171 (refd)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (refd)

Minister of Labour & Manpower v Paterson Candy (M) Sdn Bhd [1980] 2 MLJ 122 (refd)

Pahang South Union Omnibus Co Bhd v Minister of Labour And Manpower & Anor [1981] 2 MLJ 199 (refd)

Perusahaan Otomobil Kedua Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor [2000] 5 CLJ 351 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 4B(b), 9(4)
Industrial Relations Regulations 1980 r 4(1)(a), 5(a)
Public Authorities Protection Act 1948 s 2(b)
Trade Unions Act 1959 ss 2, 26(3),71A(1)(a), 74(1)(c)
Trade Unions Regulations 1959 r 44

Appeal from: Originating Motion No 25–39 of 1998 (MT-4) (High Court, Pulau Pinang)

Edward Saw (Edmund Saw with him) (Goh Eng Kee & Co) for the appellants.
Munahyza bte Mustafa (Federal Counsel)(Penang Legal State Advisor) for the first respondent.
K Kumarathiraviam (Shan & Gooi) For second respondent

Zaleha Zahari JCA (delivering judgment of the court):

[1] Unless expressly stated, reference to any legal provision refers to the provisions of the Industrial Relations Act 1967 ('the Act'). The Industrial Relations Regulations 1980 (PU (A) 254/80) shall be referred to as 'the Regulations' and the Trade Unions Act 1959 as 'the Trade Unions Act'.

[2] The appellants obtained leave on 24 June 1998 to apply for an order of certiorari to quash the decision of the first respondent, the Minister of Human Resources ('the Minister'), dated 21 March 1998 for Marulee (M) Sdn Bhd ('the appellant') to accord recognition to Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam ('the second respondent'). The substantive motion for certiorari filed on 2 July 1998 was dismissed by the Penang High Court Judge on 27 August 1999 and the matter now comes on appeal before us.

[3] The appellants' case essentially rests on whether in arriving at the findings which the respective authorities did, and the Minister's reliance on the reports submitted by the relevant authorities after carrying the investigations which they did, had complied with the rule of natural justice. The duty to act fairly, one of the prime functions of judicial control of executive and administrative action, is to ensure that the fundamentals of fair play have been observed. The requirements of natural justice vary in their content and ambit of application depending on the circumstances of the case. In the application of the concept of fair play, there must necessarily be flexibility to the different situations in which it is to be applied. Regard must be given to the scope of the proceedings, the source of jurisdiction, the way it normally falls to be conducted and its objective.

[4] In respect of a claim for recognition of a trade union the decision making process is statutory as prescribed by Part III of the Act. An employee union may, at any time, serve on an employer a claim for recognition in respect of all employees or class of employees employed by the employer under s 9(2) of the Act. The employer upon whom the claim is served has the option to do either one of the following. The employer may accede to the claim and accord recognition, in which case, the matter is resolved. The employer may also reject the claim within the prescribed period of 21 days and notify the union in writing of the grounds for not according recognition. Alternatively, within the prescribed 21 days, the employer may refer the matter to Director General of Industrial Relations (DGIR) to ascertain whether their workmen were members of the union claiming recognition [s 9(3)(b) and 9(3)(c)]. Should the union not be accorded recognition, or where the union fails to comply with s 9(3) of the Act, it was open to the union claiming recognition to file a report in writing to the DGIR [s 9(4)].

[5] Upon receipt of an application under 9(3)(c), or a report under section 9(4) of the Act, the DGIR is under a statutory duty to attempt toresolve the matter. In attempting to resolve the dispute the DGIR is authorized 'to take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter'

(s 9(4A). In order to perform his functions under s 9(4A) the DGIR is empowered 'to E require the trade union of workmen, the employer, or the trade union of A employers concerned, to furnish such information as he may consider necessary or relevant' [s 9(4B)(a)] and 'may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded' [s 9(4B)(b)]. This provision also provides that the performance of duties and functions of the Director General of Trade Union (DGTU) under this paragraph shall be deemed to be a performance of his duties under the written law relating to the registration of trade unions. There is accordingly a direct nexus of the power entrusted to the DGTU under the Act and that conferred upon him by the Trade Unions Act.

[6] A 'trade union' is defined in s 2(1) of the Trade Unions Act 1959 to mean, so far as relevant for present purposes, any association or combination of workmen within any particular 'trade, occupation, or industry or within any similar trades, occupation or industries'. The DGTU is the authority upon whom power is conferred to determine the scope and ambit of trade union membership whether there is similarity in trade, business and profession. Section 2(2) of the Trade Unions Act provides that for the purposes of the definition of 'trade union' in s 2(1), and registration of a trade union, 'similar' means similar in the opinion of the DGTU (see decision of the Federal Court in *Minister of Labour & Manpower v Paterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122).

[7] The definition of a 'trade union' in s 2(1) of the Trade Unions Act, read together with s 9(4B)(b) of the Act, requires the DGTI, in carrying out his functions under s 9(4A) thereof, to refer to the DGTU for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded. This provision further provides that the performance of duties and functions by the DGTU under this paragraph shall be deemed to be a performance of his duties and functions made under the written law relating to the registration of trade unions.

[8] Further, by virtue of s 26(3) of the Trade Unions Act 1959, where a trade union has served a claim for recognition under the Act, the DGTU may, at the request of the DGIR, carry out a membership check in the manner prescribed by regulations to ascertain the percentage of workmen or any class or workmen, in respect of whom recognition is being sought who are members of the union making the claim.

[9] On recognition of a trade union, the following appears to be settled by the authorities. 'Competency' in a trade union is to be decided upon two areas. Firstly, whether the employees are within the scope of representation of the trade union (ie similarity in trade profession and industry) and secondly, whether the trade union has the majority members (see *Euromedical Industries Sdn Bhd v Menteri Sumber Manusia & Yang Lain* [1999] 5 CLJ 171).

[10] A trade union of employees is bound by their constitution in respect of the scope of representation. A union can only represent the category or class of workmen

specified in their constitution. It must be an association of workmen in similar trades, occupations or industries (see *Minister of Labour & Manpower v Paterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122). Where a trade union is registered to represent employees in a particular establishment, its scope of representation is limited and confined to representing employees employed by that establishment and they cannot represent employees employed by another establishment [see *Perusahaan Otomobil Kedua Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor* [2000] 5 CLJ 351]. It is for the trade union to establish that they have sufficient members to represent the employees within the scope of their representation in a particular industry, trade or profession.

[11] The law does not require the DGIR to make a 'decision' on the matter. It is not for the DGIR to decide whether or not to accord recognition. The power to accord recognition is only given to the employer under 9(3)(a), or the Minister under s 9(5). The most that the DGIR can do in resolving the matter under s 9(4A), is to advise the employer to accord recognition, and if the matter is not resolved, to then invoke s 9(5) of the Act and refer the dispute to the Minister for decision.

[12] Although the law confers upon the DGIR a discretion whether or not to seek the assistance of the DGTU when a claim for recognition is lodged, the courts have held that, where the circumstances warrants so, the DGIR should utilize the expertise of the DGTU with a view of resolving such disputes as the failure to refer to the DGTU may result in the Minister not being adequately informed or briefed on the matter in dispute. A decision made without the participation of the expertise of the DGTU is open to be analyzed by standards of unreasonableness in judicial review proceedings (see *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337). When a matter is not resolved and a report under 9(4) of the Act is referred to the Minister by the DGIR, it is incumbent upon the Minister to make a decision (see *Pahang South Union Omnibus Co Bhd v Minister of Labour And Manpower & Anor* [1981] 2 MLJ 199 (FC)).

[13] The factual matrix against which the application of the appellants was dismissed is as follows. On 19 October 1996 the second respondent issued a notice of claim for recognition in Form A of the Regulations from the appellant. Upon receipt of the second respondent's claim for E recognition the appellants did nothing. The appellants did not accord recognition, neither did they notify the second respondent in writing of the grounds for not according recognition within the 21 days period provided in the law. The appellants did not, at that stage, deem it fit to state that the reason they were not according recognition to the second respondent was because their manufacturing activities involved 'handicraft' work, or because of the usage of metals in their products, a 'Non-Metallic Union' was not the right union to represent their workers. Rule 3 of the Second Respondent's Constitution limits membership to 'employees.... engaged in the manufacture of non - metallic mineral products... '.

[14] A month lapsed before the appellants acted on the claim for recognition. The appellants issued letter dated 18 November 1996 to the DGIR requesting the DGIR to carry out an examination ('menjalankan pemeriksaan') to ascertain whether

A the second respondent was competent to represent their employees. By issuing this letter which they did, the appellants appeared: (a) to be exercising, out of time, the right conferred upon them by s 9(3)(c) of the Act; (b) that the independent body conferred with jurisdiction in resolving matters such as this, do carry out an investigation and submit their findings to enable the appellants to make a considered
B decision on the claim of recognition lodged.

[15] On the part of the second respondent, when the appellant did not respond to their claim for recognition within the 21 days period provided by s 9(3), the second respondent lodged a report in writing vide letter dated 20 December 1996 to the DGIR requesting him to intervene to the claim for recognition pursuant to s 9(4) of
C the Act.

[16] We would like to address the issue of the failure of the appellants' to respond to the claim for recognition made by the second respondent within the time frame of 21 days prescribed by s 9(3) of the Act at this stage. The learned judge considered
D the appellants' failure to respond to the claim for recognition within the prescribed period of 21 days as' fatal' and held that it was mandatory for the appellants to act within the prescribed time frame.

[17] On the facts of this case we are of the view that nothing turns on the
E appellants' failure to respond within the prescribed time frame of 21 days. We are not in agreement with the learned jJudge's ruling on this point for the following reasons. The DGTU clearly has a statutory duty under s 9(4A) of the Act to attempt to resolve a claim for recognition. Notwithstanding the fact that appellants' request to the DGIR to conduct an examination on the competency of the second respondent was lodged out of time frame provided by the law, the DGIR was nevertheless under
F a statutory duty to act upon the report in writing lodged by the second respondent under s 9(4) consequent upon the appellants' failure to respond to the claim for recognition within the prescribed time frame. As the DGIR was under a statutory duty to resolve the claim of recognition upon receipt of the second respondent's report in writing under s 9(4), we are of the view that nothing turns on the
G appellants' request to the DGIR to investigate on the competency of the second respondent to represent the appellants' employees out of the time frame prescribed by s 9(3).

[18] The DGIR then exercised the power conferred upon him by s 4B(b) of the
H Act. As the issue of competency of the second respondent to represent the appellants' employees had been raised, vide letter dated 25 February 1997, the DGIR requested the DGTU to carry out an investigation and submit a report to him, which letter was also extended to the appellants and the second respondent.

I **[19]** The DGTU responded to the DGIR's letter dated 25 February 1997 by taking the following action. The DGTU issued letter dated 1 April 1997 informing the appellants that an officer from his Department would be present at the appellants' premises on 8 April 1997 at 10.45am to observe the industrial activities carried out by the appellants. The DGTU also requested the appellants to furnish information relating to the date of the appellants' incorporation, ownership, as well as details of

their employees according to gender as at 31 March 1997, breakdown of the company's Divisions/Units, the nature of the goods produced, the manner or process of production of their goods, as well as the marketing of such goods.

[20] The DGTU then submitted a report of the result of his investigations and findings on the issue of the second respondent's competency to represent the appellants' employees to the DGIR. According to the DGTU's report dated 24 May 1997, after carrying out the investigations which he did, the DGTU was of the opinion that the second respondent was competent to represent the appellants' employees.

[21] Upon receipt of the DGTU's report, the DGIR issued letter dated 11 June 1997 informing the appellants (as well as the second respondent) of the DGTU's findings. In the same letter the DGIR informed both the appellants and the second respondent that a membership check would be carried out to ascertain whether the majority of the appellants' employees were members of the second respondent upon receipt of Forms B and C of the Regulations, and that they would both be duly notified of the result of the membership check.

[22] Another letter was issued by the DGIR on the same date (11 June 1997) to the Appellants by which letter the Appellants were informed that a membership check pursuant to r 4(1)(a) of the Regulations would be conducted. For this purpose the appellants were required to furnish to the DGIR a list of their employees as at 19 October 1996 in Form B of the Regulations not later than 25 June 1997.

[23] The appellants' responded to the DGIR's letter dated 11 June 1997 in terms of letter dated 1 July 1997. They disputed the findings of the DGTU and the DGIR that the second respondent was competent to represent their employees.

[24] It is necessary at this stage to deal with the learned judge's ruling that it was necessary for the appellants not only to challenge the decision of the Minister, but also challenge the findings of the DGTU. In relation to the DGTU's decision on the issue of 'competency', we note that s 71A(1)(a) of the Trade Unions Act 1959provides that any person dissatisfied with the opinion of the DGTU under s 2(2) may, within 30 days from the date of the opinion, appeal to the Minister in the manner prescribed by Regulations. On this issue, r 44 of the Trade Unions Regulations 1959 applies. Thus, although the appellants had, at that stage, the right to appeal to the Minister against the DGTU's findings on the issue of 'competency' pursuant to s 71A(1)(a) of the Trade Unions Act 1959, whether deliberately or otherwise, this right was not exercised. Although the appellants had by letter dated 1 July 1997 requested the DGIR to carry out an investigation on the issue of competency of the second respondent to represent their employees, they were however not prepared to abide by E the result of the investigations and findings of the DGTU when the findings were against them.

[25] We are of the view that the effect of the appellants' failure to exercise this right of appeal against the findings of the DGTU on the issue of competency within the time frame given in s 74(1)(c) of the Trade Unions Act 1959 is that the DGTU's

decision that the second respondent was a competent union to represent the appellants' employees was binding upon the appellants. In this situation we are of the view that the learned High Court Judge had not erred when, in his judgment, he took note of the appellants' failure to challenge the findings of the DGTU. To conclude on this point, by reason of the appellants' failure to exercise their right of appeal to the Minister on this issue, it was no longer open for the appellants to subsequently question the competency of the second respondent to represent the appellants' employees. In any event, even if an appeal had been lodged, the appellants is not entitled to call on the DGTU to justify his findings of fact on the issue of competency, nor to expect a Court in judicial review proceedings to reverse the findings of fact of the DGTU.

[26] What transpired next was this. The DGIR issued another letter on 9 July 1997 to the Appellants, which letter was sent by registered post. By reason of the issue of 'competency' having been determined in the second respondent's favour, the appellants were advised to make a decision on the claim of recognition. In para 3 of this letter the DGIR expressly stated that should the appellants fail to make a decision, the appellants were required to furnish, in triplicate, a list of the names of appellants' employees eligible to be represented by the second respondent on the date recognition is sought (19 October 1996), which information had earlier been requested by letter dated 11 June 1997.

[27] The appellants' response was in terms of letter dated 26 August 1997. Three copies of Form B were furnished to the DGIR as requested. In the second paragraph of this letter the appellants raised for the first time the issue of their involvement in 'handicraft business', and they again disputed the DGIR's findings of competency of the second respondent to represent their employees. In the light of our earlier ruling on the failure to exercise the right of appeal to the Minister on the issue of competency, in our opinion it is too late for the appellants at this stage to advance further grounds at the DGIR and DGTU level, to review their earlier findings. The DGIR and DGTU was *functus officio* as far as the issue of competency was concerned.

[28] On the same day, by letter dated 16 September 1997, the DGIR requested the appellants to furnish a list of their employees in triplicate in Form B particularizing the nature of the work carried out by such employees, the E date when the employee ceased to be in the appellants' employment (if applicable), within 14 days of the date of the said letter pursuant to r 4(1)(a) of the Regulations. This procedural provision is to implement the substantive provision enacted in s 9(4B) of the Act. By r 4(1)(a) of the Regulations the DGIR is empowered in carrying out his functions under Part III of the Act (which relates to the recognition and scope of representation of trade unions) to require the DGTU to ascertain and inform him as to whether or not the workmen in respect of whom the claim for recognition is made, are members of the trade union making the claim. By letter dated 13 November 1997, the DGIR requested the DGTU to carry out an investigation as to the membership of the appellants' employees in the second respondent as at 19 October 1996, which letter

was extended to the appellants as well as the second respondent. The Forms B and Forms C furnished by the Appellants to the DGIR was duly forwarded to the DGTU for his further action.

[29] The DGTU informed the DGIR of the result of the membership check carried out by letter dated 13 January 1998. According to this letter the membership check carried out by the DGTU shows, as at the date recognition is sought (19 October 1996), 73.52% of the appellant's employees were members of the second respondent.

[30] The DGIR duly notified the appellants of the result of the E membership check carried out by the DGTU vide letter dated 20 January 1998. Paragraph 4 of this letter states that by reason of the majority of the appellants' employees being members of the second respondent as at 19 October 1996, the appellants were advised to accord recognition to the second respondent. Paragraph 5 of this letter required the appellants to communicate their decision direct to the second respondent within 14 days of the date of that letter, and to extend a copy thereof to the DGIR. The appellants were also informed that, should the matter not be resolved within the specified period given, s 9(4C) of the Act would be invoked.

[31] It is common ground that the appellants did not abide by the DGIR's advice. The time frame given for appellants to make a decision lapsed. The appellants failed to make a decision within the time frame given.

[32] This continued failure on the part of the appellants to make a decision on the claim for recognition caused the DGIR to issue yet another letter on 18 February 1998 to them. By this letter a final opportunity of another period 14 days was given to the appellants to make a decision on the claim for recognition. The appellants were again notified that should they fail to make a decision within the extended period given, the matter would be referred to the Minister pursuant to s 9(4C) of the Act. This extended period of 14 days again passed by without the appellants making any decision on the claim for recognition.

[33] As the DGIR was unable to resolve the dispute, the DGIR submitted a report on the matter to the Minister together with the reports and findings of the DGTU. Based on the material provided to him, the Minister's decision dated 21 March 1998 was that the appellants was to accord recognition to the second respondent with effect from 19 October 1996. This court notes that the Minister's decision was in terms of the prescribed Form D pursuant to r 5(a) of the Regulations which does not provide for the giving of detailed reasons. A copy of the Minister's decision in Form D was duly forwarded to the appellants vide the DGIR's letter dated 28 March 1998.

[34] From the facts as enumerated above, it is clear that the procedure prescribed by the law had clearly been observed by all of the relevant authorities at the different stages of the decision making process. On the part of the DGTU, in making the enquiries at the two-staged process, prior to giving his expert opinion for the consideration of the DGIR in attempting to resolve the claim for recognition, it is abundantly clear that the appellants' had been given the fullest opportunity to

participate and state their case on the respective issue then in question. The record shows of repeated requests and opportunities given to the appellants to furnish all relevant documents and information for the consideration of the relevant authorities. In other words, to state their case, to enable the relevant authorities to make a considered finding on the matters in issue at the respective stages.

[35] It is very clear to us from the record that the failure of the appellants to make a decision to the claim of recognition had prolonged the dispute. The information sought by the relevant authorities, was only submitted after continued reminders were issued. All parties had been kept informed of the findings of the relevant authorities at every stage. It would appear it was for these reasons that the learned High Court Judge had, in his judgment, stated that 'more than one opportunity had been given to the appellant to state their case'. As far as the rule of natural justice in relation to the right to be heard is concerned, we are of the view that this rule has been strictly observed by the DGIR and DGTU in arriving at the conclusions which they did.

[36] It is common ground that the opinion and findings of the DGIR and DGTU submitted to the Minister were taken into consideration by the Minister in arriving at the decision which the Minister did under s 9(5) of the Act. As for the appellants' argument that the Minister was not bound by the reports of the DGIR or the DGTU, and reliance on them by the Minister in arriving at the decision which he did, renders such decision as being a 'rubber stamp', our views are as follows. It has been firmly established by case law that the results of investigations carried out by the E DGIR and the DGTU's Department were important material to enable the DGIR in the first instance to resolve a dispute. These reports were relevant and important material in the making of a considered decision by the Minister under s 9(5) of the Act. The submission of these reports to the Minister established that the Minister had been adequately informed and been appraised of all relevant facts to enable him to make a considered decision on the claim for recognition in issue which could not be resolved by the DGIR [*Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia*]. The Minister was clearly entitled to rely on the reports submitted. There was no necessity for the Minister himself to conduct a further enquiry as contended by the appellants.

[37] On the allegation that Minister's decision is liable to be set aside by reason of a failure to give detailed reasons in arriving at the decision which he did, the record shows that the appellants were well aware that Minister's decision was grounded on the reports submitted by the DGIR containing the opinion/findings of the DGIR/DGTU, that the appellants' employees came within the membership scope of the second respondent and the result of the membership check carried out showing that 73.52% of the appellant's employees were members of the second respondent on the date recognition was sought.

[38] The affidavits of the DGIR, DGTU and the Minister disclose that they have all acted fairly, properly and reasonably in the exercise of their respective powers under the law. There has never been the slightest suggestion that the relevant

authorities, be it the DGIR/DGTU, had acted otherwise than in good faith in arriving at the findings which they did, as well as the Minister, in making the decision which he did.

[39] On the facts of this case the appellants is not entitled to the discretionary relief sought and the learned judge was clearly right in dismissing the claim for certiorari.

[40] For the reasons given this appeal was dismissed costs. The deposit is to be paid to the respondents equally to account of their taxed costs. Costs of the first respondent will be on a solicitor client basis pursuant to the provisions of s 2(b) of the Public Authorities Protection Act 1948.

Appeal dismissed with costs.

Reported by Loo Lai Mee